



UCIP Personnel Conference 2004


“Interviewing, Background Checks, and Lessons Learned from Litigation”

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- Legal Issues in Interviewing Prospective Employees
 - Legal Issues in Conducting Background Checks
 - Other Legal Issues in the Hiring Process
 - Lessons Learned in Personnel Law Litigation by UCIP Member Counties
 - Lessons Learned in Personnel Law Litigation by Utah County
 - Other Personnel Law Litigation Lessons

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Age

- When were you born?
- When did you graduate from high school?
- How old are you?
- If you could choose to go to one concert this summer would you go to see Neil Diamond or Eminem?

Permitted area of questioning about Age?

- An employer can rightfully inquire whether the candidate meets the minimum federal age requirements for employment.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Race

- What is your race?
- What would you say your skin color is?
- Is your spouse Caucasian?

Permitted area of questioning about Race?

- None

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Sexual Orientation

- Are you straight or gay?
- How do you feel about working with gay or bisexual people?
- Do you have a boyfriend?

Permitted area of questioning about Sexual Orientation?

- Probably none. Stay away from this area of questioning.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Religion

- Do you go to church?
- What religion are you?
- Do you take time off work for religious purposes?
- Are there any holidays or days of the week you can't work?

Permitted area of questioning about Religion:

- Employer can make a statement of regular days, hours, or shifts to be worked, i.e. "We often work holidays and weekends. Is there anything that would prevent you from doing so...."

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ National Origin

- You sound like you have an accent; where are you from?
- Where were you born?

Permitted area of questioning about National Origin?

- Employers can ask whether an applicant is eligible to work in the United States

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Political Beliefs

- Who did you vote for in the last election?
- Do you belong to a political party?

Permitted area of questioning about Political Beliefs?

- None, for government employees.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Disability

- Do you have any physical disabilities?
- Do you take any prescription drugs?
- Have you ever been in rehab?
- Have you ever been an alcoholic?
- Do you have AIDS?
- How many sick days did you take last year?
- Have you ever been diagnosed with a mental illness?
- Have you ever received worker's compensation, or been on disability leave?

Permitted area of questioning about Disability:

- Employers may ask whether an applicant has any conditions which may limit the applicant's ability to perform all required tasks of the job.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Gender, Marital Status, Pregnancy, or Child Planning

- What is your marital status?
- Do you have small children
- Are you planning to have children soon?
- Are you pregnant?
- What is your maiden name?

Permitted area of questioning about Marital Status, etc.?

- Employers may inquire whether an applicant has ever worked under a different name or whether an applicant has personal responsibilities that could interfere with the requirements of the job (i.e., travel or overtime hours).

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Physical Characteristics / Photographs

- Questions regarding height and weight

*Permitted area of questioning about Physical
Characteristics?*

- Employers may ask about an applicant's ability to perform the job.
- Employer can require a photograph after the applicant is hired.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Emergency Contacts

- Name and address of a relative to be notified in the case of an accident or emergency.

*Permitted area of questioning about Emergency
Contacts?*

- Employer may ask the name and address of a person to be notified in the case of an accident or an emergency.

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Legal Issues in Interviewing Prospective Employees

Areas of Concern

■ Bankruptcy / Financial Matters

- Have you ever been declared bankrupt?
- Have you ever filed for bankruptcy?

Permitted area of questioning about Bankruptcy?

- Employers may ask or get enough info on the application to do a credit report to get the information you may want about credit ratings, bankruptcy, ownership, length of residence at an address, or past garnishments of wages

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Legal Issues in Interviewing Prospective Employees

Accommodation Requests for Interview

- Does the ADA require you to provide an accommodation for a job interview for an applicant who has a disability?

Yes, a "reasonable accommodation" must be provided to enable disabled applicants to be considered for a job opening. Also, you can't refuse to consider an applicant because he/she requires a reasonable accommodation to compete for or perform a job.

- Can you refuse to provide an applicant with an accommodation because it would be difficult or expensive to provide?

You don't have to provide a specific accommodation if it would cause an "undue hardship" (i.e. requires significant difficulty or expense). But you can't refuse just because it requires some financial costs or administrative inconvenience.

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Legal Issues in Interviewing Prospective Employees

Accommodation Requests for Interview

- Examples of reasonable accommodations:
 1. Providing written materials in accessible formats, such as large print, Braille, or audiotape.
 2. Providing readers or sign language interpreters.
 3. Ensuring that recruitment, interviews, and tests are held in accessible locations.
 4. Providing or modifying equipment or devices.
 5. Adjusting or modifying application policies and procedures.

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Legal Issues in Interviewing Prospective Employees

Accommodation Requests for Interview

- An applicant has a learning disability and needs extra time to complete a test. Does the ADA require that extra time be given or that the way the test is given be modified?

Yes, the ADA requires that application tests be given in a format or manner that doesn't require the use of an impaired skill, unless the test is designed to measure that skill.
- After an applicant has asked for a specific accommodation, can the employer offer a different accommodation?

Yes, if the different accommodation meets the applicant's needs. If more than one accommodation meets the applicant's needs, the employer can choose which one to provide, and the applicant can't insist on a specific accommodation only because of personal preference.

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Legal Issues in Conducting Background Checks

Why perform background checks?

- It costs approximately \$7,000 to replace the average salaried employee, \$10,000 to replace a mid-level employee, and \$40,000 to replace a senior executive.
- Studies indicate that 75% of all job applicants make one or more “minor misrepresentation” on their resumes, and that 30% make significant misrepresentations”, such as phony credentials or falsified work experiences.

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Legal Issues in Conducting Background Checks

Should employers conduct background checks on all prospective employees?

- You don't have to do background checks for everyone, but your reasons for doing or not doing them should be reasonably related to legitimate business interests.
- If you have 120 employees, 40 of whom drive trucks, and 80 of whom are administrative or support staff, you may have a legitimate reason for investigating only driver applicants. But if you investigate one driver applicant, you should investigate them all.

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Legal Issues in Conducting Background Checks

How can an application be used to investigate an applicant's background?

- Most applications ask for information about the applicants education and criminal history. Check up on the veracity of that information before the interview, allowing you to ask informed, meaningful questions during the interview.

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Legal Issues in Conducting Background Checks

What questions can an applicant's references be asked?

- Have you seen Jane's most current resume? Let me tell you what it says about her former job responsibilities and her accomplishments. Is that a fair description of her responsibilities and accomplishments?
- Have you ever observed Jane becoming frustrated or angry? How does she handle frustration? How does she resolve anger?
- How does Jane resolve conflicts? Have you had a firsthand experience observing Jane supervising others?
- Do you believe Jane is a trustworthy individual? Why or why not?

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Legal Issues in Conducting Background Checks

What limitations are there about the use of information obtained from a third-party background check?

- The mere discovery of disparaging information about an applicant isn't necessarily enough to disqualify that person from employment. The deficiencies that you find must be shown to be "job-related"

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Legal Issues in Conducting Background Checks

Can an applicant be asked to submit a drug test?

- Yes, applicants can be asked to submit to a test for illegal drugs. But you should adopt a policy for drug-testing, that provides for adequate procedural and confidentiality safeguards.

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Legal Issues in Conducting Background Checks

Can an applicant be required to take a polygraph test before the employer issues a job offer?

- Generally No. But, the Employee Polygraph Protection Act recognizes three exceptions for using polygraphs in the workplace:
 1. Prospective employees who will work with controlled substances.
 2. Prospective employees in high-risk security positions.
 3. Employees who are reasonably believed to have participated in thefts resulting in economic loss to the employer.

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Legal Issues in Conducting Background Checks

Can an applicant be required to take a genetic test?

- No.

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Legal Issues in Conducting Background Checks

What is the biggest red-flag to look for in doing background checks?

- GAPS. Unexplained lapses in a person's life, education, or work history.

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Other Legal Issues in the Hiring Process

- “English Only” requirements
 - The EEOC has generally found these rules to be a form of national origin discrimination by limiting employment opportunities for employees or prospective employees who aren't proficient in English.
 - Some courts have allowed such requirements if they are carefully limited and applied in a fashion that can be justified by sound business reasons.

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Other Legal Issues

■ Privacy Issues

- U.S. Constitution has created “Zones of Privacy” protected from government intrusion in the workplace & the basic tests are:
 1. Is there a reasonable or legitimate expectation of privacy?
 2. Would the intrusion be highly offensive to a reasonable person?
 3. Is there, nevertheless, some reasonable justification by the employer that outweighs the expectation of privacy?
- Key Practice Point: When you conduct a search in the workplace for a work-related purpose, the legal standard is whether the search is reasonable.
- If the search is part of an investigation of criminal activity in conjunction with law enforcement officials, then the Fourth Amendment requirements of probable cause and a properly issued search warrant must be met.

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Lessons learned in Personnel Law Litigation by Utah County

■ Employee Handbooks

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Lessons learned in Personnel Law Litigation by UCIP member counties

- Section 1983 Civil Rights case involving county employees who were husband and wife.
- Section 1983 Civil Rights case involving supervisor of one of the employees in previous case.
- Case alleging discrimination and harassment on the basis of gender.
- Quid Pro Quo Sexual Harassment case
- Wrongful Discharge case
- Consolidation of Office case
- Notary case

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